Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

ARTHUR SCOTT CLAY,

Petitioner,

v.

DAVID DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, AND THE OFFICE OF THE PLATTE COUNTY PROSECUTING ATTORNEY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—as the Second, Fourth, and Seventh Circuits have held—this Court's decision in *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), allows a habeas corpus petitioner to make a showing of "actual innocence" in the sentencing phase of a non-capital case, or whether—as the Eighth and Tenth Circuits, and the court below, have held—this Court's decision in *Sawyer* may be applied to sentencing determinations only in capital cases.

PARTIES TO THE PROCEEDINGS

Arthur Scott Clay was the relator below and is the petitioner in this Court.

David Dormire, Superintendent of the Jefferson City Correctional Center, and the Office of the Platte County Prosecuting Attorney were the respondents below and are the respondents in this Court.

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Petition for a Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

Arthur Scott Clay respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINIONS BELOW

The December 5, 2000 opinion of the Supreme Court of Missouri is reported at 37 S.W.2d 214 and is reproduced in the appendix hereto ("App.") at 1a. The November 23, 1999 Opinion and Order of the Missouri Court of Appeals, Western District, granting Clay's petition for habeas corpus and

petition for writ of mandamus is available at 1999 WL 1054129 and is reproduced at App. 16a.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on December 5, 2000. App. 1a. On January 9, 2001, that court denied a timely filed motion for rehearing. App. 29a-31a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

As applicable to this case, Section 195.290 of the Missouri Code, subsequently repealed, provided:

> After a period of not less than six months from the time that an offender was placed on probation by a court, such person, who at the time of the offense was twenty-one years of age or younger, may apply to the court which sentenced him for an order to expunge from all official records, except from those records maintained under the comprehensive drug abuse prevention and control act, as enacted in 1970, and all recordations of his arrest, trial and conviction. If the court determines, after a hearing and after reference to the controlled dangerous substances registry, that such person during the period of such probation and during the period of time prior to his application to the court under this section has not been guilty of any offenses, or repeated violation of the conditions of such probation, he shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and conviction. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or trial or conviction in response to any inquiry made of him for any purpose.

Section 557.036.2 of the Missouri Code provides, in pertinent part:

> The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless:
>
> (1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt; or
>
> (2) The state pleads and proves the defendant is a prior offender, persistent offender, dangerous offender, or persistent misdemeanor offender as defined in section 558.016, RSMo, a persistent sexual offender as defined in section 558.018, RSMo, or a predatory sexual offender as defined in section 558.018, RSMo.

Section 557.036.4 of the Missouri Code provides, in pertinent part:

> If the defendant is found to be a prior offender, persistent offender, dangerous offender or persistent misdemeanor offender as defined in section 558.016, RSMo:
>
> (1) If he has been found guilty of an offense, the court shall proceed as provided in section 558.016, RSMo; or
>
> (2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for the class A felony.

INTRODUCTION

Petitioner Arthur Scott Clay ("Clay") was sentenced as a prior offender under Missouri law. In its decision below, the Supreme Court of Missouri recognized that Clay was not, in fact, a prior offender. Nevertheless, the court rejected Clay's

habeas corpus claim that such sentencing violated his rights under the Due Process Clause of the Fourteenth Amendment and Missouri law because Clay did not raise that claim at trial, in his post-conviction motion, or on direct appeal. The court so held based on its erroneous view that this Court's decision in *Sawyer* v. *Whitley*, 505 U.S. 333 (1992)—holding that a habeas petitioner may raise an otherwise procedurally-barred constitutional claim by showing that he is "actually innocent" of an element essential to the imposition of his sentence—cannot be applied to the sentencing phase of non-capital cases.

This petition calls upon the Court to resolve a widespread and direct conflict among the federal and state appellate courts on this important question of law. Three circuits have held that the *Sawyer* "actual innocence" rule applies to the sentencing of defendants in non-capital cases. Two circuits have held, like the court below, that *Sawyer* applies only to capital cases. As explained below, this Court should grant certiorari and resolve this enduring conflict in order to ensure that *Sawyer* is interpreted and applied uniformly throughout the Nation.

STATEMENT OF THE CASE

1. **Petitioner's Concededly Illegal Sentence.** There is no dispute in this case that Clay was illegally sentenced as a prior offender even though he was not a prior offender as defined by Missouri law. In 1974, Clay, then only nineteen years old, pled guilty to one count of distributing hashish. He was sentenced to probation, which he completed successfully. In 1980, pursuant to Section 195.290 of the Missouri Code as it then existed, Clay petitioned the Circuit Court of Platte County to expunge his 1974 conviction. Section 195.290 allowed those who were under the age of twenty-one at the time of their offense, and who had committed no other subsequent crimes, to petition for expungement of their

conviction. The statute expressly stated as follows regarding the issuance of the expungement order:

> The effect of such order shall be to restore such person, *in the contemplation of the law*, to the status he occupied prior to such arrest and conviction. [Sec. 195.290 RSMo 1978 (repealed 1989) (emphasis supplied).]

Having met all of the necessary requirements, Clay's request for expungement was granted, in chambers, on July 2, 1980. Although the standard procedure in Missouri following the entry of such an order was to place the signed order in the court's file and mail copies to the parties, this procedure was, inexplicably, not followed in this case. App. 18a. Likewise, for reasons that are not clear from the record, Clay's conviction was not formally expunged as it should have been. *Id.* at 19a. Accordingly, as a result of the State's own negligence, Clay had no notice or knowledge that his request for expungement had, in fact, been granted.

On September 13, 1988 Clay was charged with a new offense. On January 17, 1989, after the prosecutor introduced a copy of the conviction that should have been expunged from Clay's record years earlier, Clay was found to be a prior offender by the same judge who had ordered the expungement of his conviction eight years earlier. App. 2a. On April 18, 1989, the jury convicted Clay.

Missouri law at that time mandated that Clay be sentenced by the same jury which determined guilt or innocence. Mo. Rev. Stat. § 557.036.2. In direct contravention of this statute, however, the judge, not the jury, sentenced Clay to a term of twenty years based on the judge's erroneous determination that Clay was a prior offender, which itself resulted from the State's failure to expunge his conviction. *See* App. 2a; Mo. Rev. Stat. § 557.036.4. Moreover, the judge further violated Clay's rights by considering the prior conviction in determining the length of his sentence. App. 2a. Had the State properly expunged the prior conviction, the jury could not

have been informed of anything related to Clay's 1974 conviction. Mo. Rev. Stat. § 557.036.2. In 1991, the Missouri Court of appeals affirmed Clay's conviction and the denial of his post-conviction motion. App. 3a.

On June 25, 1992, Clay wrote to the Platte County Clerk's Office to request "the judgments and orders of my convictions for prior felonies." App. 19a. In its response, the Platte County Clerk informed Clay that her office had no record of any past convictions with the exception of the conviction pursuant to which he is currently incarcerated. *Id.* There is no indication in the record of this case that Clay had knowledge or notice that the expungement order had been entered in 1980 until he received this response from the Platte County Clerk in 1992. App. 23a. Therefore, it was impossible for him, at his 1989 trial, in his statutory post-conviction motion, or on direct appeal to have argued that the court should not have sentenced him as a prior offender due to an expungement order he did not know had been entered.

A copy of the July 2, 1980 expungement order was finally certified by the Platte County Clerk on August 25, 1992, over twelve years after being entered, and a copy of the certified expungement order was then sent to the office of the Platte County prosecutor. App. 11a. On September 29, 1992, the prosecutor, noting that Clay was now seeking to obtain any and all records regarding him that were currently in the possession of the prosecutor, sought permission from the trial court to remove the record of Clay's conviction prior to providing the prosecutor's records to Clay. *Id.* The record appears to indicate that this request was granted, and that the court further ordered that a complete copy of Clay's records be made available to him. *Id.*

Upon learning of the improper use of his expunged conviction against him during sentencing, Clay promptly filed a writ of habeas corpus in Platte County, alleging, *inter alia*, violations of his constitutional rights. That petition was

dismissed on improper venue grounds. Clay then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri raising the same issues, which was denied on August 29, 1995. The Eighth Circuit affirmed on the ground that Clay had failed to fully exhaust all available state court remedies. *Clay* v. *Gammon*, No. 95-3789WM, 1996 WL 343019 (8th Cir. June 24, 1996).

2. The Decision of the Missouri Court of Appeals. Following the decision of the Eighth Circuit, Clay sought relief in the Missouri Court of Appeals, Western District, which appointed counsel. After a hearing on the merits, the court unanimously ruled in favor of Clay, issuing a writ of habeas corpus, as well as a writ of mandamus directing that his prior conviction be formally expunged. *See* App. 27a-28a.

When considering Clay's petition, the Court analyzed whether Clay was entitled to habeas relief for the violation of his rights by examining whether he demonstrated "manifest injustice." App. 20a-26a. The inquiry into manifest injustice, in turn, "require[d] the court to consider whether [the] movant had a valid reason for not raising the issue at a prior procedural juncture, such as on direct appeal or in a post-conviction motion." App. 22a. Finding Clay's situation analogous to its prior decision in *Brown* v. *Gammon*, 947 S.W.2d 437 (Mo. Ct. App. 1997)—in which the court granted relief to a habeas corpus petitioner who did not deliberately bypass an opportunity for strategic reasons—the court found that

> Mr. Clay was unaware of the expungement, and thus unaware of the grounds he now asserts provide him with a right to habeas corpus relief, until he received a copy of the expungement order [in 1992] after the Platte County prosecutor requested permission to expunge his records of Mr. Clay's prior conviction without providing him with a copy of those records. [App. 23a.]

In addition, the Court of Appeals found that Clay did not fail to timely bring this claim for strategic reasons. As the court held, "Mr. Clay had no reasonable incentive for not mentioning the expungement; this course of action could only hurt him by denying himself a jury-determined sentence." App. 24a. Furthermore, the court found that "subsequent to learning in 1992 that the expungement order had been granted, Mr. Clay diligently took steps to obtain relief." *Id.* The court therefore held "that Mr. Clay is entitled to raise the issue of his wrongful confinement by means of habeas corpus and that his failure to raise it on direct appeal or in his post-conviction motion did not constitute a waiver of his right to habeas corpus relief." *Id.*

The court further found that the evisceration of "Mr. Clay's right to jury sentencing rises to the level of manifest injustice" because the "right to jury recommendation of sentence is granted by statute, and the sentence recommended by the jury will constitute the maximum punishment which the court can impose." App. 25a (citation omitted). After a thorough analysis of Clay's case, the court held that "[t]he evidence was *indisputably insufficient* to support [the finding of prior offender status] once the expunged conviction is excluded." *Id.* (emphasis supplied). The court therefore granted Clay's request for habeas corpus relief and for a writ of mandamus expunging his record. App. 27a-28a.

3. The Decision of the Supreme Court of Missouri. The Supreme Court of Missouri upheld the Court of Appeals' issuance of a writ of mandamus expunging Clay's record, recognizing that Clay "has a clear, unequivocal, specific and previously-adjudicated right to have his prior conviction expunged." App. 7a. Nevertheless, over the strong dissent of two Justices, the court vacated the writ of habeas corpus, holding that Clay was procedurally barred from raising his constitutional claims. App. 6a-7a.

In reaching this conclusion, the court stated that its "manifest injustice" standard "is essentially the same * * * as the term 'miscarriage of justice' or 'fundamental miscarriage of justice' used in federal habeas cases." App. 4a (internal citation omitted). In applying that standard, the court expressly adopted this Court's habeas corpus precedents and standards: "Following the lead of the United States Supreme Court's habeas corpus cases, and most recently *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner 'to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent.' " App. 4a-5a (quoting *Schlup*, 513 U.S. at 327). Citing this Court's emphasis on finality and the conservation of judicial resources, the court flatly stated that "[t]hese interests * * * justify the same approach in Missouri." App. 5a.

The court then turned its attention to this Court's decision in *Sawyer* and, without any recognition whatsoever of the clear split in authority on how *Sawyer* should be interpreted, stated that "[w]ith the exception of the penalty phase in capital cases, manifest injustice under the 'actual innocence' standard applies only to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process." App. 6a (citing *Sawyer*, 505 U.S. at 340; footnote omitted). The court therefore concluded that Clay was procedurally barred from raising his constitutional claims because it interpreted this Court's precedents as not allowing Clay to argue that he was actually innocent of being a prior offender. App. 6a. And the court so held even though it recognized, through its affirmance of the writ of mandamus, that Clay was not, in fact, a prior offender under Missouri law.

Following this ruling, Clay filed a timely motion for rehearing expressly arguing that he was actually innocent of being a prior offender. The Supreme Court of Missouri denied that motion on January 9, 2001. App. 29a-31a.

REASONS FOR GRANTING THE WRIT

The question presented by this case is straightforward: under this Court's decision in *Sawyer*, may a habeas corpus petitioner make a showing of actual innocence—thereby allowing him to raise a constitutional claim held to have been procedurally defaulted—in the sentencing phase of a non-capital case?[1] This straightforward question, however, has resulted in an entrenched and irreconcilable conflict among the federal and state courts that have addressed it. To date, three federal circuits—the Second, Fourth, and Seventh—have held that *Sawyer* applies to the sentencing phase of non-capital cases. The Fifth Circuit has twice assumed, without deciding, that this is the correct interpretation of *Sawyer*. By contrast, two circuits—the Eighth and Tenth—have interpreted *Sawyer*, like the court below, as permitting actual innocence claims in the sentencing context only in capital cases. The Sixth Circuit has joined the latter two circuits through unpublished opinions adopting the same rule.

As explained below, this conflict in authority is widespread and persistent, and has been expressly acknowledged by numerous courts and commentators. This case, moreover, presents an appropriate vehicle to resolve the conflict, because it is undisputed that, but for his alleged procedural default, Clay would have been entitled to relief from his concededly illegal sentence. Accordingly, Petitioner submits that the time has come for the Court to grant certiorari to resolve the conflict and clarify the law in this important area.

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[1] Petitioner does not concede that his claim was procedurally defaulted either under Missouri or federal law. Specifically, Clay contends that he cannot be faulted for not raising the fact of his expunged conviction at his 1989 trial, in his post-conviction motions, or on direct appeal, where he had no notice or knowledge that the conviction had been expunged.

I. THE COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICT ON THE QUESTION PRESENTED

This Court has long held that a habeas petitioner may raise an otherwise defaulted constitutional claim upon a sufficient showing that he is actually innocent of the crime charged. *See, e.g., Murray* v. *Carrier*, 477 U.S. 478 (1986); *Smith* v. *Murray*, 477 U.S. 527 (1986). In *Sawyer*, the Court made clear that this "actual innocence" exception applies as well to the sentencing phase of capital cases. There, the Court held that a habeas court may review a procedurally defaulted constitutional claim relating to the sentencing phase of a capital case, where the habeas petitioner shows "by clear and convincing evidence that no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." 505 U.S. at 335-336.

As explained below, however, federal and state appellate courts are now hopelessly divided over whether the actual innocence rule in *Sawyer* may be applied to the sentencing phase of *non*-capital cases. Specifically, courts are split over whether petitioners in non-capital cases are permitted to show—irrespective of a procedural default—that, but for a constitutional error, no reasonable fact-finder would have made a particular finding of fact that was an essential element in the petitioner's sentencing. Three circuits have interpreted *Sawyer* as holding that petitioners may raise such an actual innocence claim in the context of non-capital sentencing determinations, while at least two circuits (like the court below) have interpreted *Sawyer* as not permitting such claims. There is thus a widespread and irreconcilable conflict among the federal circuits which has now spilled over to one of the many state court systems (*see infra* at 18 & n.6) that have followed this Court's actual innocence precedents.[2]

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[2] This Court has jurisdiction to review the decisions of state courts where, as here, such decisions rest on the incorporation of federal law. *See Ohio* v. *Reiner*, No. 00-1028, slip op. at 3 (U.S.

A. The Conflict Is Both Widespread and Irreconcilable

1. The federal and state appellate courts that have addressed the question presented have taken two distinct and irreconcilable positions. The view of *Sawyer* adopted by the court below—that the actual innocence exception to the procedural default bar can be applied in the sentencing context only when capital punishment is involved—was first articulated by the Tenth Circuit in *United States* v. *Richards*, 5 F.3d 1369 (10th Cir. 1993). In that case, the court, citing *Sawyer*, flatly stated that "[a] person cannot be actually innocent of a noncapital sentence." *Id.* at 1371.

Similarly, the Eighth Circuit, in *Embrey* v. *Hershberger*, 131 F.3d 739 (8th Cir. 1997) (*en banc*), *cert. denied*, 525 U.S. 828 (1998), stated that *Sawyer*, by its terms, "applies only to the sentencing phase of death cases." *Id.* at 740.[3] The dissent in *Embrey*, however, strongly disagreed:

> The majority misreads *Sawyer*. The Supreme Court has never ruled the actual innocence exception, articulated as

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Mar. 19, 2001) (per curiam) ("[w]e have observed that 'this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law' ") (quoting *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984)); *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996) (Court had jurisdiction to review Ohio Supreme Court decision where nearly all cases cited in the state court opinion were federal cases); *South Dakota* v. *Neville*, 459 U.S. 553, 558 & n.5 (1983) (Supreme Court had jurisdiction to review decision because state ground relied on by South Dakota Supreme Court was not independent of federal law); *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *see also Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (Court has long reviewed state court decisions when the ground for a state court decision "fairly appears to * * * be interwoven with federal law").

[3] In *Embrey*, the court indicated that in certain "extremely rare" circumstances—likely applicable to Clay—a petitioner's claim may not be subject to a procedural bar when exculpatory evidence not available at trial subsequently comes to light. *Id.* at 741.

> an eligibility test in *Sawyer*, does not extend to cases involving challenges to non-capital sentences. While it is true *Sawyer* involved a challenge to a capital sentence, *Sawyer*'s analysis is not expressly restricted to cases involving capital sentences. [*Id.* at 743.]

In the present case, the Supreme Court of Missouri squarely aligned itself with the Eighth and Tenth Circuits. In the course of its opinion, the court first analyzed this Court's earlier actual innocence precedents, focusing in particular on *Schlup* v. *Delo*, 513 U.S. 298 (1995). *See* App. 4a-6a. The court then expressly followed what it believed to be this Court's actual innocence jurisprudence, concluding that "[w]ith the exception of the penalty phase in capital cases, manifest injustice under the 'actual innocence' standard applies only to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process." *Id.* at 6a. (citing *Sawyer*, 505 U.S. at 340; footnote omitted).

By contrast, three federal circuits, including the one which decided this issue most recently, have taken an opposite view. The first court to weigh in on the proper application of *Sawyer* to habeas claims challenging sentencing proceedings in non-capital cases was the Seventh Circuit in *Mills* v. *Jordan*, 979 F.2d 1273 (7th Cir. 1992). The court in *Mills*, after examining *Sawyer* and the Court's earlier actual innocence decisions, held that "[a]lthough Mills' case does not involve capital sentencing, we find similarities between Mills' case and *Sawyer* that justify the application of the actual innocence exception to Mills' sentence as an habitual offender." *Id.* at 1278.

The Seventh Circuit further noted that:

> Although the issue is not well-settled, we conclude that the actual innocence exception applies to habitual offender proceedings such as Indiana's *whether or not they involve the possibility of capital punishment*. To obtain

> the benefit of the actual innocence exception, Mills must therefore show that he is actually innocent of being an habitual offender. [*Id.* at 1279 (footnote omitted; emphasis supplied).]

The Seventh Circuit's ruling in *Mills* was later followed by the Fourth Circuit in *United States* v. *Maybeck*, 23 F.3d 888 (4th Cir. 1994), *cert. denied*, 517 U.S. 1161 (1996). Citing, *inter alia*, *Mills* and the Fifth Circuit's decision in *Smith* v. *Collins*, 977 F.2d 951, 959 (5th Cir. 1992), *cert. denied*, 510 U.S. 829 (1993) (discussed below), the court in *Maybeck* expressly rejected the argument that the actual innocence exception applies in the sentencing context only in capital cases. As the court held, "[e]xcept for the obvious difference in the severity of the sentences, we see little difference between holding that a defendant can be innocent of the acts required to enhance a sentence in a death case and applying a parallel rationale in non-capital cases." 23 F.3d at 893.

The Fourth Circuit again addressed the issue in *United States* v. *Mikalajunas*, 186 F.3d 490 (4th Cir. 1999), *cert. denied*, 529 U.S. 1010 (2000), in which the court expressly acknowledged the solidifying split in authority. Citing *Maybeck*, as well as the holdings of the Seventh, Eighth, and Tenth Circuits, the court stated that "[t]he [Supreme] Court has not addressed whether the actual innocence exception can be applied to sentencing outside the capital context, and this question has divided the courts of appeals." *Id.* at 494. The *Mikalajunas* court then reaffirmed its ruling in *Maybeck*, reiterating that the actual innocence standard is applicable to non-capital sentencing procedures where (as in this case) a career or habitual offender statute is involved. *Id.* at 495.

Most recently, the Second Circuit, in *Spence* v. *Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162 (2d Cir. 2000), entered the fray. After citing cases on both sides of the conflict in authority, the court stated:

> Because the harshness of the sentence does not affect the habeas analysis and [because] the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures. [*Id.* at 171.]

It therefore held that "the actual innocence exception applies to the sentencing phase of a noncapital trial." *Id.*

2. In addition to the courts on both sides of the question presented in this case, two other federal circuits, the Fifth and the Sixth, have addressed the question. Although the Fifth Circuit has not yet firmly decided the issue, and the precedential value of the Sixth Circuit opinions is unclear, these circuits plainly are leaning in opposite directions. Thus, the decisions of these courts only add to the confusion in the law.

In *Smith* v. *Collins*, *supra*, the Fifth Circuit noted that this Court had, in its then-recent *Sawyer* decision, extended the actual innocence exception to encompass sentencing in capital cases. 977 F.2d at 958. It then noted that, "[w]hile the Supreme Court has not addressed whether the actual innocence exception may apply to the sentencing phase of non-capital trials, a handful of lower federal courts have confronted the issue." *Id.* at 959. For purposes of analysis, the court assumed without deciding that the actual innocence exception to the habeas procedural default bar could be extended to constitutional irregularities in sentencing in non-capital cases. *Id.* Three years later, the Fifth Circuit again confronted the issue in *Sones* v. *Hargett*, 61 F.3d 410 (5th Cir. 1995). In that case the panel expressly noted the circuit split regarding the application of the actual innocence exception to sentencing in non-capital cases and observed that "the Supreme Court has not yet addressed" the issue. *Id.* at 418-419 & n.16. The court, however, stated that "[w]e again decline to resolve this issue and merely assume, *arguendo*, the applicability of the actual innocence standard to non-capital sentencing." *Id.* at 419 n.16.

By contrast, the Sixth Circuit, which has also twice faced this issue, has taken an opposite position, albeit in unpublished dispositions whose precedential value is unclear.[4] In both cases, *Black* v. *United States*, No. 95-5041, 1995 WL 445718 (6th Cir. July 26, 1995), and *Flahardy* v. *United States*, No. 95-5281, 1995 WL 570925 (6th Cir. Sept. 27, 1995), the court followed the Tenth Circuit's decision in *United States* v. *Richards*, 5 F.3d 1369 (10th Cir. 1993), holding that the actual innocence exception may not be applied to habeas claims raising constitutional violations in sentencing in non-capital cases.

3. In light of the sharply divergent holdings of the courts that have considered the issue, the existence of a conflict on the question presented cannot seriously be disputed. As noted above, virtually every court to have addressed the issue since the conflict first arose has noted the split in authority and has expressly rejected the conflicting views of other courts in reaching its own determination.

Furthermore, several district courts have also expressly recognized the conflict. *See Gómez* v. *United States*, 100 F. Supp. 2d 1038, 1048 n.6 (D.S.D. 2000) ("[t]here appears to be a split among the circuits as to whether this exception applies in non-capital cases; the Eighth Circuit has concluded that the exception does not extend to non-capital cases while

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[4] The Sixth Circuit "disfavor[s]" citation to its unpublished decisions, but allows citation to such cases if a party believes "that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well." 6th Cir. R. 28(g). And the Sixth Circuit's own cases do not make clear what, if any, precedential value its unpublished decisions should be accorded. *Compare Mitchell* v. *Rees*, 114 F.3d 571, 580 (6th Cir. 1997) (Keith, J., dissenting) (unpublished opinions "are not given the same precedential value" as published dispositions) *and Hall* v. *Shipley*, 932 F.2d 1147, 1152 (6th Cir. 1991) (stating that unpublished opinions "are of little precedential value") *with Martin* v. *Heideman*, 106 F.3d 1308, 1331 n.5 (6th Cir. 1997) (Krupansky, J., dissenting) (unpublished opinions have "no precedential value within this circuit").

other circuits have held that it does") (internal citation omitted); *Borrego* v. *United States*, 975 F. Supp. 520, 525 (S.D.N.Y. 1997) ("[t]he application of the 'actual innocence' exception to a non-capital sentence also appears to be in accord with at least three courts of appeal"); *Mobley* v. *United States*, 974 F. Supp. 553, 556-557 (E.D. Va. 1997) (noting that, "[w]hile some courts have limited the extension of the 'actual innocence' exception in the context of sentencing to capital sentences, a majority of circuits considering this question have not") (footnote omitted). And commentators have likewise noted the enduring and unresolved split in authority.[5]

B. The Conflict Is Ripe For Resolution By This Court

There is no reason for the Court to allow the conflict to persist. It has been nine years since the Court decided *Sawyer*, and during that time the federal and state courts that have faced the issue have divided themselves into starkly opposing camps. The question presented in this case is thus clearly not one that will resolve itself over time, nor one that will be clarified by the entry of additional courts into the conflict. Indeed, the need for review by this Court is heightened by the fact that what began as a conflict among federal circuits has now further widened to encompass one of the many states that follow this Court's actual innocence juris-

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[5] *See* James J. Sticha, *To Be or Not to Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 Minn. L. Rev. 1615, 1630 (1996) (noting that "[t]he Supreme Court has not addressed whether the actual innocence exception applies to the sentencing phase of noncapital trials" and that the circuit courts that have addressed the issue "disagree over the application of the exception to noncapital cases"); Sean L. Dalton, *Carved in Sand: Actual Innocence in* United States v. Maybeck, 73 N.C. L. Rev. 2388, 2397-2400 (1995) (noting the split among the federal circuits); John P. Hale, *The Federal Circuits' Development, Scope, and Definition of "Actual Innocence" and the Limitation of the Claim by* Herrera v. Collins *and* Sawyer v. Whitley, 71 U. Det. Mercy L. Rev. 1025, 1031 (1994) (same).

prudence.[6] Thus, because this issue affects many states in addition to the federal circuits, the conflict can only deepen, and the confusion become greater, as additional state and federal appellate courts weigh in.

There is similarly no indication that any of the courts that have addressed this issue are likely to change their position. Indeed, the Fourth and Tenth Circuits, which have taken opposing views on the question presented, have expressly affirmed their positions in recent years.[7] Nor is this a situation in which courts have relied on different precedents in reaching their positions, thereby raising the possibility that some courts might re-examine their earlier decisions in light of more recent precedent from this Court. To the contrary, the decisions of the five circuit courts, as well as the decision below, have all expressly purported to interpret this Court's decision in *Sawyer*. Finally, this is not a case in which it is necessary to infer the existence of a split in authority from the analysis of cases that are allegedly in conflict with one

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[6] *See, e.g., People* v. *Hudson*, Nos. 84062 & 84063, 2001 WL 205995, at *2 (Ill. Mar. 2, 2001) (citing *Sawyer* for the proposition that "[i]n order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence"); *State* v. *Redcrow*, 980 P.2d 622, 627 (Mont. 1999) (citing *Sawyer* and *Schlup* and incorporating their definitions of "actual innocence"); *State* v. *Nelson*, 587 N.W.2d 439, 443 (S.D. 1998) (citing numerous federal cases, including *Sawyer*, in explicating the meaning of "actual innocence"); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (expressly adopting the views of this Court as expressed in *Schlup*); *Hogan* v. *Warden, Ely State Prison*, 860 P.2d 710, 716 (Nev. 1993) (noting that the petitioner "failed to meet his burden of proving 'by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law' ") (quoting *Sawyer*, 505 U.S. at 336).

[7] *See Mikalajunas*, 186 F.3d 490 (4th Cir. 1999); *United States* v. *Piggee*, No. 96-6111, 1997 WL 199195 (10th Cir. Apr. 24, 1997); *Reid* v. *Oklahoma*, 101 F.3d 628 (10th Cir. 1996).

another. Here the lower appellate courts have themselves expressly acknowledged the conflict.

The conflict in authority is thus direct and widespread, and will only continue to grow until this Court clarifies the proper scope of its ruling in *Sawyer*. The time has arrived for this Court to decide the question.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND IS RIPE FOR RESOLUTION IN THIS CASE

The plethora of decisions discussed above make clear that this case presents an important and recurring issue confronted by courts throughout the Nation. Moreover, because there is no genuine dispute that a violation of Clay's constitutional rights is going unremedied due to the Supreme Court of Missouri's incorrect interpretation of *Sawyer*, the question is clearly ripe for resolution in this case.

A. The Petition Presents a Substantial, Unresolved Issue That Requires This Court's Clarification

The numerous cases cited above demonstrate that the application of the actual innocence rule to non-capital sentencing determinations is not an isolated academic issue. Rather, this is a question of law that trial courts are repeatedly required to address and apply. *See, e.g., Prince* v. *Morrow*, No. CIV. 97-1796-ST, 1999 WL 985130, at *10 (D. Or. Sept. 16, 1999); *Talj* v. *United States*, No. 96 Civ. 1926, 1997 WL 705807, at *3 (S.D.N.Y. Nov. 10, 1997); *Borrego* v. *United States*, 975 F. Supp. at 524; *Mobley* v. *United States*, 974 F. Supp. at 556-57; *Hillard* v. *Whitley*, No. 93-3441, 1994 WL 10349, at *4 (E.D. La. Jan. 4, 1994). Thus, without guidance from this Court, non-capital habeas petitioners whose constitutional claims are otherwise procedurally barred will continue to have those claims decided differently depending on where they happen to be incarcerated. Those fortunate to fall under the jurisdiction of the Second, Fourth, Seventh,

and likely the Fifth Circuits will have their constitutional rights vindicated upon a sufficient showing of actual innocence in the sentencing phase, whereas those who fall under the jurisdiction of the Eighth, Tenth, and likely the Sixth Circuits, as well as the Missouri state courts, will have their constitutional rights ignored. This is an intolerable situation, and one that can be remedied only by this Court's intervention.

Moreover, the question presented is clearly a substantial one. Indeed, contrary to the holding of the court below, there should be little doubt that this Court's decision in *Sawyer*, when properly interpreted, extends to the sentencing phase in non-capital as well as capital cases. In prior habeas cases, the Court has expressly rejected the notion that procedural default principles "apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws." *Smith* v. *Murray*, 477 U.S. 527, 538 (1986); *see also Borrego*, 975 F. Supp at 520 (applying the actual innocence exception to non-capital sentences is compelled by this Court's decisions in *Smith* and *Herrera* v. *Collins*, 506 U.S. 390 (1993)). Similarly, the Court has concluded that its holding regarding the provision of counsel to indigent habeas petitioners "should apply no differently in capital cases than in noncapital cases." *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality). As the Second Circuit noted in its recent decision on this issue, simple common sense dictates the same outcome here: "there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Spence*, 219 F.3d at 171. While death sentences obviously differ from other sentences in their severity, there is no legal reason why constitutional claims should be heard and vindicated through habeas relief in one context but not the other.

B. The Clear Constitutional Violation in This Case Warrants This Court's Intervention.

This case is an appropriate vehicle to resolve the persistent conflict because the "actual innocence" issue was squarely decided by the court below, App. 5a-6a, and was central to its holding in this case. It is plain that, had the court properly interpreted this Court's decision in *Sawyer* and allowed Clay to argue that he was actually innocent of being a prior offender, Clay would have established that fact by clear and convincing evidence. *See Sawyer*, 505 U.S. at 336. Indeed, the Supreme Court of Missouri *conceded* that Clay was not a prior offender, and that he therefore should not have been sentenced as such, when it granted his request for a writ of mandamus expunging his prior record. As the court ruled, Clay had a "clear, unequivocal, specific, and previously-adjudicated right to have his prior conviction expunged." App. 7a. It is equally clear, as the Court of Appeals held in this case, that Clay's resulting sentence, based on the erroneous finding that he was a prior offender, was illegal under Missouri law. App. 25a-26a. Yet the Supreme Court of Missouri refused to consider this violation based solely on its view that the actual innocence exception could be applied to sentencing determinations only in capital cases.

Moreover, for the same reason, the court refused to consider Clay's federal constitutional claim that " '[a]brogating [his] statutory right to jury sentencing by the use of a conviction which had been duly expunged according to law denied [him] his rights to * * * due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.' " App. 3a-4a (quoting Clay's Brief to the Supreme Court of Missouri). If, however, the court had not improperly interpreted *Sawyer* as barring Clay's habeas petition, there is no serious question that he would have been entitled to relief under the clear precedent of this Court. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), a state appellate court had affirmed a criminal defendant's sentence under an unconsti-

tutional habitual offender statute, but state law required that the sentence be imposed by a jury instead. The Court held that where state law mandates sentencing by a jury, not a judge, a defendant has a federal due process right to be sentenced in the proper manner. In short, the Court held that a state-created right to jury sentencing is constitutionally protected, via the Fourteenth Amendment, against arbitrary deprivation by the state. *Id.* at 346.

Here, Clay was incorrectly denied his right to be sentenced by a jury—in direct violation of the liberty interest this Court articulated in *Hicks*—by Missouri's *own* failure properly to expunge his prior conviction. Had Missouri carried out what even the Supreme Court of Missouri found was the State's non-discretionary duty to expunge Clay's record, he would not be before this Court today. Furthermore, as clearly held by this Court in *Hicks*, one's liberty interest in a jury sentence does not evaporate merely because the sentence imposed may otherwise have been statutorily acceptable had it been imposed by a jury. Clay's liberty interest consisted of his "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.* There can be no question that this liberty interest was abrogated when the judge improperly usurped the jury's role. And this *Hicks* violation was compounded when the judge considered Clay's prior offender status in determining the length of his sentence. For these reasons, it is clear that, under *Hicks*, Clay would have demonstrated a violation of his federal constitutional rights if the court below had not interpreted *Sawyer* as preventing him from raising that claim.

Thus, there can be no credible argument that the Court need not reach the actual innocence issue in this case because Clay could not succeed on the merits of his underlying claim.[8] Quite to the contrary, given the undisputed fact,

[8] This case falls within the category of cognizable actual innocence claims under *Herrera* v. *Collins*, 506 U.S. 390 (1993).

expressly recognized by the court below, that Clay was not a prior offender and was therefore illegally sentenced, it is clear that he would be entitled to relief but for the alleged procedural bar. This fact makes this case a particularly appropriate vehicle to resolve the persistent conflict over the proper interpretation of *Sawyer*.

Accordingly, given the persistent, widespread, and irreconcilable conflict among federal and state appellate courts, the important and recurring nature of the question presented, and the vital importance of this issue in vindicating a clear violation of petitioner's federal constitutional rights, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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Under *Herrera*, a petitioner who is actually innocent cannot seek habeas relief without establishing an independent constitutional violation. Unlike the habeas petitioner in *Herrera*, Clay has asserted a clear violation of his due process rights wholly apart from his claim that he is actually innocent of being a prior offender.

APPENDIX A

SUPREME COURT OF MISSOURI
en banc

ARTHUR SCOTT CLAY,	)	
	)	
Relator,	)	
	)	
v.	)	No. SC82331
	)	
DAVE DORMIRE, Superintendent, and the OFFICE OF THE PLATTE COUNTY PROSECUTING ATTORNEY,	)	
	)	
Respondents.	)	

ORIGINAL PROCEEDING IN HABEAS CORPUS AND MANDAMUS

Relator, Arthur Scott Clay, was convicted of forcible rape in 1989 and sentenced to twenty years in prison. He was sentenced by the judge rather than by the jury because the judge found him to be a prior offender, based on the erroneous consideration of an expunged prior conviction. A copy of the expungement order came to light only after relator's direct appeal and post-conviction motion had been denied. He now petitions for a writ of habeas corpus ordering a new trial and for a writ of mandamus directing that all references to the prior conviction be expunged from his records. The petition was filed originally in the Court of Appeals, Western District, and after issuance of an opinion granting both habeas corpus and mandamus relief, this Court granted respondents' application for transfer and assumed jurisdiction. Mo. Const. art. V, sec. 10. Rule 83.04. Having now determined that habeas corpus relief is unwarranted,

relator is ordered remanded to the custody of the Department of Corrections. However, the petition for writ of mandamus is granted, and a peremptory writ of mandamus is ordered to issue.

On July 12, 1974, in the Circuit Court of Platte County, Missouri, relator pled guilty to the offense of distributing hashish and was placed on probation. Years later, after successfully completing probation, relator filed a motion with the sentencing judge pursuant to sec. 195.290, RSMo 1978 (repealed 1989), to expunge the conviction. While it was in effect, sec. 195.290 required trial courts to expunge the convictions of drug offenders who had been placed on probation if the offender was under twenty-one years of age at the time of the offense, had not reoffended or repeatedly violated probation, and had applied for expungement. The statute also provided that "the effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and conviction." *Id.* On July 2, 1980, following an evidentiary hearing, the sentencing judge entered an order expunging the conviction, on a finding that the requirements of sec. 195.290 had been satisfied.

Thereafter, on May 9, 1989, relator was convicted by a Platte County jury of the offense of forcible rape. During the trial, the judge found that relator was a prior offender based on the prosecutor's introduction of a copy of relator's 1974 drug conviction, which, inexplicably, had never been expunged from the records of the circuit clerk's office. Because of relator's status as a prior offender, the judge, rather than the jury, imposed sentence as provided under sec. 557.036.2, RSMo 1986. Although the 20-year sentence was within the statutory range of punishment of five years to life, the trial court apparently considered the prior expunged conviction, as well as relator's successful completion of probation for that offense, in imposing the sentence.

The existence of the expungement order was not raised by relator at trial or in his direct appeal or in his subsequent post-conviction motion. The Court of Appeals affirmed the conviction and denial of post-conviction relief, except as to a minor clerical error, on June 18, 1991. *State v. Clay*, 812 S.W.2d 872, 873 (Mo. App. 1991). In 1992, relator contacted the circuit clerk's office requesting the "judgments and orders of my convictions for prior felonies," and he was advised that there was no record of any felony convictions under his name except the recent rape conviction. Thus, by that time, the prior conviction that the clerk had certified for the prosecutor's use during the rape trial had apparently finally been expunged from relator's file. The record does not reveal when or how this occurred or how the expungement order came to the clerk's attention at that late date. Although the 1974 conviction had been expunged from the clerk's records, no copy of the expungement order was forwarded to the Department of Corrections, and the briefing on this appeal makes clear that the Department's records still reflect relator's expunged conviction.

Once relator was made aware that his prior conviction should not have been used to deny him jury sentencing, he filed for habeas corpus relief in Platte County, but his petition was denied for improper venue under Rule 91.02. Relator then applied for habeas corpus relief, under 28 U.S.C. sec. 2254 (1994), in the United States District Court for the Western District of Missouri. The District Court denied that request on August 29, 1995, and the decision was affirmed by the United States Court of Appeals for the Eighth Circuit, for the reason that relator was first required to request such relief in the state courts. *Clay v. Gammon*, 89 F.3d 840 (8th Cir. 1996). Finally, relator filed the petition for writs of habeas corpus and mandamus that is the subject of this opinion.

The petition is based on the newly-discovered evidence of the expungement order. Relator contends that "[a]brogating

[his] statutory right to jury sentencing by the use of a conviction which had been duly expunged according to law denied [him] his rights to a fair trial and to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution." He also contends that he was "harmed . . . because the trial court considered the prior conviction in assessing [his] punishment . . . [and] determined [his] sentence on the basis of information that was not properly before the court."

The relief available under a writ of habeas corpus has traditionally been very limited, and courts are not required to issue this extraordinary writ where other remedies are adequate and available. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo. banc 1993). Out of concern over "duplicative and unending challenges to the finality of a judgment," a person cannot usually utilize a writ of habeas corpus to raise procedurally-barred claims—those that could have been raised, but were not raised, on direct appeal or in a post-conviction proceeding. *Id.* at 446. Very limited exceptions to this rule are recognized where the person seeks to use the writ "to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results" if habeas corpus relief is not granted. *Id.* Here, relator makes no claim of jurisdictional error, but complains only that manifest injustice has occurred.

Although *Simmons* did not define the term "manifest injustice" for habeas cases, it is essentially the same, as the Eighth Circuit observed in *Duvall v. Purkett*, 15 F.3d 745, 747 and n.3 (8th Cir. 1994), *cert. denied*, 512 U.S. 1241, as the term "miscarriage of justice" or "fundamental miscarriage of justice" used in federal habeas cases. Following the lead of the United States Supreme Court's habeas corpus cases, and most recently *Schlup v. Delo*, 513 U.S. 298, 327 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the

habeas corpus petitioner "to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'" *id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)), and further, "[t]o establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence]," *id.* As explained in *Schlup* and earlier cases, the actual innocence component of the miscarriage of justice standard is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits, [and] . . . [w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice . . . ." *Id.* at 315-16 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

Ultimately, the Supreme Court has concluded that "explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.' " *Id.* at 322 (citing *Murray v. Carrier*, 477 U.S. at 496). These interests, excluding comity, of course, justify the same approach in Missouri. Indeed, the actual innocence component is all the more appropriate for Missouri cases given the fact that defendants are already afforded an initial habeas-like post-conviction relief proceeding under Rule 29.15 or Rule 24.035 in which constitutional claims (usually involving ineffective assistance of trial counsel) like those that so often appear in habeas corpus petitions may be presented.

With the exception of the penalty phase in capital cases,[1] manifest injustice under the "actual innocence" standard applies only to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process. *See Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Errors during sentencing in non-capital cases are only actionable in habeas corpus if it is shown that the court had no jurisdiction to impose the sentence in question, as in the case where a court imposes a sentence that is in excess of that authorized by law, *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995), or where the sentencing court utilized a repealed and inapplicable statute. *State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc 1999). In the case at hand, relator makes no claim that the sentence imposed exceeded that authorized by law or that the sentencing judge had no jurisdiction otherwise. Instead, relator's claims—that he was denied jury sentencing and that the judge improperly considered the prior conviction in imposing sentence—are mere trial court errors that have nothing to do with his actual innocence. The failure to raise these claims on direct appeal or in a post-conviction relief proceeding is a procedural bar that cannot be overcome through habeas corpus.

Relator's petition for writ of mandamus is quite another matter. It is well-settled that "[t]he purpose of the writ is to

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[1] In the penalty phase of capital cases, a claim of manifest injustice based on actual innocence may be raised to challenge the evidence of aggravating circumstances that made defendant eligible for the death penalty. *Sawyer v. Whitely*, 505 U.S. 333, 345-47 (1992). A defendant may be "'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.* Even though the Court extended the notion of actual innocence to aggravating circumstances in death cases, it made clear that actual innocence analysis does not apply to other sentencing errors, such as "additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347.

execute, not adjudicate," and to be entitled to a writ, the relator must have "a clear, unequivocal, specific right to have an act performed." *State ex rel. Missouri Growth Ass'n v. State Tax Com'n*, 998 S.W.2d 786, 788 (Mo. banc 1999). In this case, relator has a clear, unequivocal, specific, and previously-adjudicated right to have his prior conviction expunged from the records of the Department of Corrections. The order of July 2, 1980, which is mandated by and fully complies with the expungement statute, sec. 195.290, RSMo 1978, states that ". . . IT IS ORDERED, ADJUDGED AND DECREED that all official records, recording [relator's] arrest, trial and conviction be expunged and that the said movant be restored, in the contemplation of the law, to the status he occupied prior to the written arrest and conviction . . . ." The state's position is that issuance of the writ is pointless because the existence of the prior conviction has been widely publicized throughout the extended litigation of this case, and the injury to relator is "*de minimus*." This argument borders on the frivolous. Under the sentencing court's order and under the statute, relator is entitled to have the record of conviction expunged regardless of the practical effect of the expungement.

Because habeas corpus relief is unwarranted, relator is ordered remanded to the custody of the Department of Corrections. However, the petition for writ of mandamus is granted, and the writ is ordered to issue.

/s/
Stephen N. Limbaugh, Jr., Judge

SUPREME COURT OF MISSOURI
en banc

ARTHUR SCOTT CLAY,	)	
	)	
Relator,	)	
	)	
v.	)	No. SC82331
	)	
DAVE DORMIRE, Superintendent, and the OFFICE OF THE PLATTE COUNTY PROSECUTING ATTORNEY,	)	
	)	
Respondents.	)	

DISSENTING OPINION

I.

I respectfully dissent. Rule 91 provides that habeas corpus relief is available to any person restrained of his liberty within this state.[1] The majority concludes that since Mr. Clay failed to raise the expungement issue in his direct appeal or his subsequent post-conviction relief motion filed under Rule 29.15 that his petition is procedurally barred.[2] However, this Court has held that "[i]nasmuch as habeas corpus jurisdiction springs from the constitution, it may not be eliminated by statute or rule."[3] Procedural default in remedies previously available *may* provide the basis for denying a petition in

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[1] Rule 91.01(b). See also section 532.010 (RSMo. 1994).

[2] *Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo. banc 1993).

[3] *White v. State*, 779 S.W.2d 571, 573 (Mo. banc 1989). See also Art. 1, section 12 of the Missouri constitution which states "that the privilege of the writ of habeas corpus will never be suspended," and Art. V, section 4.

habeas corpus, but this limitation may be overcome by establishing the grounds relied on were unknown during the postconviction relief proceedings.[4]

Rule 91's committee notes refer to postconviction relief motions filed under Rules 24.035 and 29.15 as being the exclusive remedy in the situations identified by those respective rules.[5] However, subsection (d) of both rules require that the movant "shall declare in the motion that the movant has listed all claims for relief *known* to the movant and acknowledging his understanding that he waives any ground for relief *known* to the movant that is not listed in the motion." (emphasis added)

It's clear from the record that by the time of the second trial, Mr. Clay's prior conviction had not been expunged as required by statute. The Court notes that "[a] copy of the expungement order came to light only after relator's direct appeal and postconviction relief motion had been denied." The principal opinion also acknowledges that as late as 1992, one year after the denial of Mr. Clay's postconviction relief motion, the circuit court clerk was still incorrectly advising Mr. Clay that his prior conviction had been expunged. Based upon the circuit court's error, the trial judge inappropriately considered the prior conviction and inappropriately applied section 557.036.2(2), denying Mr. Clay's right to a jury sentencing.

Mr. Clay's lack of knowledge of this claim until after all procedural remedies were time-barred was the precise reason

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[4] *Id.* at 572. *See also Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993).

[5] Rule 24.035 allows a person, after conviction based upon a guilty plea, to challenge the conviction on the basis of jurisdictional error, ineffective assistance of counsel, and constitutional and statutory violations. Rule 29.15 allows the same claims to be filed in instances of a trial court conviction.

the court of appeals granted Mr. Clay's habeas writ. Curiously, the majority does not address this issue at all, and the only way it can so hold is to impute knowledge of the trial court's error to Mr. Clay.

Analyzing the rules and prior case law, the court of appeals correctly determined when lack of knowledge of a postconviction claim rises to the level of manifest injustice in order to grant habeas relief. In *Merriweather v. Grandison*,[6] the court stated:

> The determination of "manifest injustice," of course, calls for a broader inquiry, into which would figure the prisoner's own want of diligence, or his deliberate by-passing of an available remedy as a matter of strategy, which might constitute waiver of his habeas corpus remedy.[7]

Applying this standard, the court of appeals determined that Mr. Clay's claim had not lingered due to lack of diligence, nor was it a deliberate trial strategy justifying waiver of his habeas remedy. The court appropriately granted him habeas relief.

Merriweather was not the first case where Missouri courts addressed lack of knowledge to bring forth a claim on direct appeal or by postconviction relief motion. As previously noted, this Court articulated that lack of knowledge could justify habeas relief in *White v. State*[8] and *Simmons v. White*.[9] Following this Court's dictate, Missouri's court of

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[6] 904 S.W.2d 485, 489 (Mo. App. 1995).

[7] *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. 1995).

[8] *White v. State*, 779 S.W.2d 571, 573 (Mo. banc 1989).

[9] *Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo. banc 1993).

appeals has granted habeas relief in these very situations.[10] Mr. Clay's situation is no different. He was unaware that his prior record had not been expunged until after the time-bar for postconviction relief had passed. The majority must have conceded this point otherwise they could have dispensed with Mr. Clay's claim with a simple application of Rule 29.15(d) as opposed to redefining the manifest injustice standard.

Since the entire issue discussed by the court of appeals has not been addressed, it is not clear how today's ruling will affect the decisions in *White, Simmons, Merriweather*, and *Brown*. Will those rulings, or their pertinent portions holding lack of knowledge cannot procedurally bar a claim for habeas, be overruled?

While not binding on this Court, the federal courts have had the opportunity to interpret this area of Missouri law. Relying on the language in *State v. White* and this Court's rules, the federal courts have determined that Rules 24.035 and 29.15 do not operate as a suspension of the writ of habeas corpus. Rule 91 remains available to persons confined in Missouri after the time for filing for relief under the other rules has passed.[11] "[A]n issue not known or reasonably discoverable to the petitioner in the period during which he could file for relief under Rule 24.035 or 29.15 can provide the basis for relief under Rule 91."[12]

II.

The majority states the only options available to utilize a writ of habeas corpus would be to raise jurisdictional issues

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[10] *Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App. 1997).

[11] *Walls v. Delo*, 755 F. Supp. 873, 875 (E.D. Mo. 1991); *Fletcher v. Armontrout*, 733 F. Supp. 1348 (W.D. Mo. 1990); and *Beverly v. Armontrout*, No. 89-14-CV-W-9, 1990 WL 126995 (W.D. Mo. July 27, 1990).

[12] *Id.*

or in circumstances so rare and exceptional that manifest injustice resulted.[13] The Court then adopts the "actual innocence" standard articulated by the United States Supreme Court to narrowly define what constitutes manifest injustice.[14] Under this standard, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."[15] Additionally, "without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice."[16] It appears this Court no longer follows prior case law defining "manifest injustice" or the current application of Rules 24.035(d) and 29.25(d).

Immediately fatal to the majority's utilization of the actual innocence standard with regard to Mr. Clay's petition is their own observation that it is inapplicable in his situation. Specifically the opinion notes that "[w]ith the exception of the penalty phase in capital cases, manifest injustice under the 'actual innocence' standard applies *only* to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process."[17] The Court then identifies the standard for habeas relief during the sentencing process but refuses to apply it.

As the principal opinion explains, errors in sentencing in non-capital cases are subject to habeas relief where a court

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[13] *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo. banc 1993).

[14] See *Murray v. Carrier*, 477 U.S. 478, 496 (1986) and *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

[15] *Id.*

[16] *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

[17] *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992).

imposes a sentence in excess of that authorized by law[18] and where a sentencing court based its decision on a repealed and inapplicable statute.[19] Instead of applying the appropriate standard identified, the majority attempts to use some magic thread to weave together these two habeas standards, the actual innocence standard for challenging convictions and the "sentencing in excess of jurisdiction" standard employed for errors in sentencing. Wearing its newly spun cloak of standards on top of the law, the Court dismisses Mr. Clay's claim by stating he raised no jurisdictional issue and the "mere trial court error" of improperly considering the prior conviction does not concern his actual innocence. The majority simply cannot combine its discarded actual innocence standard with the jurisdictional sentencing issue.

The principal opinion tries to further mask the issue of jurisdiction by stating the trial judge did not exceed his jurisdiction by levying a sentence within the statutory range and that, in any event, jurisdiction was not raised. This Court can, as can any other, raise jurisdiction sua sponte, and jurisdictional defects cannot be waived.[20] Clearly, the trial judge exceeded his jurisdiction. "A sentence fixed by the court instead of by the jury when the Habitual Criminal Act

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[18] *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995).

[19] *State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc 1999).

[20] *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. 1995), citing to *State v. Mitchell*, 563 S.W.2d 18, 23 (Mo. banc 1978). Subject matter jurisdiction concerns the cause of action and the relief sought, and exists *only* when the tribunal has the right to determine the controversy or grant the relief prayed. *State Tax Commissioner v. Administrative Hearing Commission*, 641 S.W.2d 69,72 (Mo. banc 1982), and Rule 55.27(g)(3). The right to pronounce sentencing in a criminal trial falls under subject matter jurisdiction and may be raised sua sponte at any stage in the proceedings.

is not applicable is void."[21] Although the punishment assessed fell within the sentencing guidelines the jury could have fixed, the defendant was still prejudiced because the jury might have imposed a lesser punishment.[22]

The trial judge ignored statutory and precedential authority by denying Mr. Clay's right to a jury trial and pronouncing sentence himself. Mr. Clay's situation is analogous with the standard set in *State v. Edwards*.[23] While the trial judge in this instance did not apply a repealed statute, he did apply an inapplicable statute to seize sentencing power that he did not possess. With the judge clearly exceeding his jurisdiction in the sentencing phase of Mr. Clay's trial, habeas corpus relief is available by this Court's own standard in *Edwards*. Even if the Court rejects the previously accepted lack of knowledge claim by redefining "manifest injustice," the trial judge's actions exceeded his jurisdiction meeting the standard for habeas relief for errors in sentencing.

III.

Finally, Mr. Clay is granted a writ of mandamus to expunge the prior conviction—an action that should have occurred some sixteen years ago. The majority finds that Mr. Clay has "a clear, unequivocal, specific, and previously-adjudicated right to have his prior conviction expunged from the records of the Department of Corrections." For some reason the majority has no trouble supporting Mr. Clay's right to this expungement under section 195.290, RSMo.

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[21] *State v. Bryant*, 375 S.W.2d 107, 110(5) (Mo. 1964). Note: The *Bryant* Court referenced section 556.280 as the Habitual Criminal Act. This act was repealed and replaced with section 588.016 in 1979. The state must plead and prove the defendant was a prior offender under section 588.016 to properly invoke section 557.036.2 and suspend a defendant's right to a jury trial.

[22] *State v. Wiley*, 412 S.W.2d 485, 487 (Mo. 1967).

[23] 983 S.W.2d 520, 522 (Mo. banc 1999).

1978, now repealed; but at the same time cannot find any statutory right under section 557.036.2(2), a currently effective statute, for Mr. Clay to have received a jury sentencing.

While not a constitutionally guaranteed right, Missouri preserves the right to jury sentencing under section 557.036.2(2). Only if one is a prior or persistent offender does he lose this statutory right. "Such a right to jury sentencing has been found to be such a valuable right that our courts have long held that where . . . a court has improperly classified a defendant as a prior offender for purposes of sentencing, and the evidence is insufficient to support that finding, defendant is entitled to a new trial on all issues."[24]

Because defendant's punishment was improperly fixed, the judgment in his criminal case should be reversed and the cause remanded for a new trial. For these reasons I respectfully dissent.

/s/
Ronnie L. White, Judge

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[24] *State v. McFall*, 866 S.W.2d 915, 919 (Mo. App. 1993). Accord, *State v. Harris*, 547 S.W.2d 473, 475-476 (Mo. banc 1977); *State v. Blackwell*, 459 S.W.2d 268, 271 (Mo. banc 1970); *State v. Vermillion*, 446 S.W.2d 788, 790 (Mo. banc 1969); *State v. Hill*, 371 S.W.2d 278, 282-283 (Mo. banc 1963); *State v. Olson*, 806 S.W.2d 111, 112-113 (Mo. App. 1991); *State v. Finch*, 746 S.W.2d 607, 612 (Mo. App. 1988); *State v. Meeks*, 734 S.W.2d 282, 283 (Mo. App. 1987); *State v. White*, 710 S.W.2d 934, 937[4] (Mo. App. 1986); *State v. Tate*, 657 S.W.2d 727, 728-729[2-6] (Mo. App. 1983); *State v. Wickizer*, 641 S.W.2d 849, 852-853[9] (Mo. App. 1982).

APPENDIX B

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ARTHUR SCOTT CLAY,	)	
	)	
Relator,	)	
	)	WD 56804
	)	
vs.	)	
	)	
DAVE DORMIRE,	)	
SUPERINTENDENT AND	)	Opinion Filed:
THE OFFICE OF THE PLATTE	)	
COUNTY PROSECUTING ATTORNEY	)	
OF PLATTE COUNTY,	)	November 23, 1999
	)	
Respondent.	)	

ORIGINAL PROCEEDING IN HABEAS CORPUS AND MANDAMUS

Before Presiding Judge Laura Denvir Stith,
Judge Edwin H. Smith and Judge Albert A. Riederer

Defendant-Relator Arthur Scott Clay was convicted of forcible rape in 1989. Mr. Clay was sentenced by the judge rather than by the jury because the judge found him to be a prior offender based on the erroneous consideration of an expunged prior conviction, and received a 20-year sentence. A copy of the expungement order came to light only after Mr. Clay's direct appeal and post-conviction motion had been denied. He therefore applies for habeas corpus relief, asserting manifest injustice resulted from the improper

consideration of the expunged prior conviction, as it was used to deny him jury sentencing.

We agree that the trial court should not have considered the expunged prior conviction, that Relator timely raised this issue as soon as he became aware of it, and that, in this circumstance, manifest injustice has resulted because consideration of this expunged conviction resulted in denial of Mr. Clay's right to jury sentencing. We therefore grant Mr. Clay's Petition for Writ of Habeas Corpus and direct Respondent to remand Mr. Clay to Platte County for a complete new trial, at which Mr. Clay's sentence will be determined by a jury. We also grant Mr. Clay's Petition for Mandamus, and issue our Permanent Writ of Mandamus directing Respondent to expunge from its records all references to Mr. Clay's 1974 conviction and all references to him as a prior offender, and direct that, upon resentencing, he be given the status and rights as to confinement and consideration for parole of one who is not a prior offender.

I. FACTUAL AND PROCEDURAL HISTORY

On July 12, 1974, Relator Clay pled guilty to one count of distributing hashish, and received probation. He was 19 years old. Six years later, having successfully completed his probation, Mr. Clay requested the Circuit Court of Platte County to expunge his 1974 conviction pursuant to Section 195.290 RSMo 1978 (Repealed L. 1989). That statute, as then in force, stated that a defendant's criminal record may be expunged if the party seeking the order was 21 years or younger at the time of the offense and had committed no crimes subsequent to his sentencing for the conviction sought to be expunged. It required the court to expunge the conviction if the court found these requirements were met, and stated that:

> The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and conviction.

Sec. 195.290 RSMo 1978 (Repealed L. 1989).

The record in this Court contains an order of Judge J.M. Yeaman, dated July 21, 1980, granting the motion for expungement. Normally, such an order would be placed in the file upon signing and mailed to the parties. As discussed below, however, so far as the record shows this did not occur here, and it is unclear from that record where the signed order remained for the next eight and one-half years.

The record does reveal that, on September 13, 1988, approximately 14 years after Mr. Clay was convicted of drug possession and 8 years after Judge Yeaman granted the expungement of that conviction, Mr. Clay was charged with forcible rape of a 14-year old girl who was a friend of his daughter. Mr. Clay was tried on that charge in the spring of 1989. During the trial on the rape charge, the court found that Relator was a prior offender based on the prosecutor's introduction of a copy of Mr. Clay's 1974 drug conviction. The document presented by the prosecutor bore the Platte County Clerk's certification dated January 17, 1989. Thus, as of that date, the Platte County record of Mr. Clay's conviction had not been expunged, despite the order 8 years earlier so requiring.

On April 18, 1989, the jury found Mr. Clay guilty of forcible rape, a crime that can carry a sentence of 5 years to life. The jury should have been the body to assess sentence. *See* Sec. 557.036.2(2) RSMo 1994. Because the judge had erroneously found Mr. Clay to be a prior offender through the prosecutor's presentation of the "expunged" conviction, however, Mr. Clay was instead sentenced by the judge. The judge affirmatively considered Mr. Clay's expunged conviction, and his successful completion of probation, in sentencing Mr. Clay to 20 years imprisonment for the rape.

The existence of the expungement order was not raised by Mr. Clay in his direct appeal or in his post-conviction motion. We affirmed the rape conviction and denial of post-

conviction relief, except as to a minor clerical error, on June 18, 1991. On June 25, 1992, Mr. Clay forwarded a letter to the Platte County Clerk's office requesting "the judgments and orders of my convictions for prior felonies." The next day, the Platte County Clerk wrote Mr. Clay that her office was unable to find a record of any felony convictions under his name except the recent rape conviction. Thus, by that date, the prior conviction, which the clerk had certified to the prosecutor on January 17, 1989, had apparently finally been expunged from Mr. Clay's file. The record does not reveal when or how this occurred, or how the expungement order came to the Platte County Clerk's attention at that late date.

On August 25, 1992, the Platte County Clerk certified a copy of Judge Yeaman's July 2, 1980 expungement order. Shortly thereafter, the Clerk sent a copy of this certified expungement order to the Platte County prosecutor. On September 29, 1992, the prosecutor filed a motion in which he noted the above history, indicated that the law required expungement of the prosecutor's records as to Mr. Clay's expunged conviction, noted that Mr. Clay was now seeking to obtain any records in the prosecutor's possession about him, and asked for permission to expunge the records of the conviction before providing Mr. Clay with his records. This would mean that Mr. Clay would not receive a copy of the prosecutor's records of his own expunged conviction. It appears, from the limited record before us, that the court granted the prosecutor's request to expunge the record, but as a part of that order directed that a copy of his own records should be made available to Mr. Clay. Apparently, no copy of the expungement order was forwarded to the Department of Corrections and its briefing on this appeal makes it clear that its records still reflect Mr. Clay's expunged conviction. Indeed, it asks us to allow the references in that record to this conviction to remain, arguing that it will be burdensome to have to go through its records to remove references to Mr. Clay's admittedly expunged conviction.

Once Mr. Clay was made aware that his prior conviction had been expunged at the time it was used to deny him jury sentencing, he filed for habeas corpus relief in Platte County. Such relief was denied because that county was not the proper venue under Rule 91.02. He then applied for habeas corpus relief pursuant to 28 U.S.C. Sec. 2254 in the United States District Court of the Western District of Missouri. Judge Howard F. Sachs denied that request on August 29, 1995, and the decision was affirmed by the United States Court of Appeals for the Eighth Circuit, on the basis that Mr. Clay was first required to request such relief in the state courts. *Clay v. Gammon,* 89 F.3d 840 (8th Cir. 1996). Mr. Clay then filed for relief in this Court. We appointed counsel. Finding that Mr. Clay had shown good cause for requesting relief in this Court, we issued our Preliminary Writs of Habeas Corpus and Mandamus pursuant to Rules 91 and 94.

II. HABEAS CORPUS RELIEF IS AVAILABLE TO CORRECT MANIFEST INJUSTICE

The relief available under a writ of habeas corpus has traditionally been very limited, *Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993), and courts are not required to issue this extraordinary writ where other remedies are adequate and available. *White v. State*, 779 S.W.2d 571, 573 (Mo. banc 1989). For this reason, a person cannot usually utilize a writ of habeas corpus to raise an issue which the person could have raised, but did not raise, on direct appeal or in a post-conviction proceeding. *Id.* Very limited exceptions to this rule are recognized where the person seeks to use the writ "to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results" if habeas corpus relief is not granted. *Simmons*, 866 S.W.2d at 446. *Accord*, *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. W.D. 1995).

In order to grant habeas corpus relief due to a jurisdictional error, it must be patent on the face of the record that the court acted beyond its jurisdiction in confining the defendant in the manner ordered. Such relief is not available merely to correct errors not evident from the face of the record. Prior cases have held that jurisdictional errors are evident on the face of the record where a court sentences defendant to a term longer than that allowed by law, but a jurisdictional error is not sufficiently patent to permit habeas corpus relief where a court has erroneously sentenced a defendant as if he had three prior convictions whereas he in fact had only two, for the error in that ruling is not evident on the face of the record.[1]

By contrast, in order to be entitled to habeas corpus relief due to manifest injustice, one need not show a jurisdictional error that is patent on the record. One must, instead, make what has been termed "a broader inquiry" into the question whether there is evidence that the injustice which caused the petitioner to be wrongfully confined was caused by "the prisoner's own want of diligence, or his deliberate by-passing

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[1] *Compare Thomas v. Dormire*, 923 S.W.2d 533, 534 (Mo. App. W.D. 1996); *Merriweather*, 904 S.W.2d at 488-89; *State v. Sevier*, 336 Mo. 1236, 83 S.W.2d 581, 583 (Mo. banc 1935) (all recognizing habeas corpus relief is available if sentence is above maximum permitted by law) *with Simmons v. White*, 866 S.W.2d at 445-46 (error is not jurisdictional if defendant is merely sentenced as if three prior convictions had been proved when in fact only two were proved). We do not decide into which category of cases Mr. Clay's claim of use of an expunged conviction falls, for, even were we to determine that it did not constitute the type of patent jurisdictional defect which would entitle him to habeas corpus relief due to the fact that, on its face, the sentence was within the range permitted by the statute, we would still be required to determine whether use of the conviction ordered expunged to deny Mr. Clay jury sentencing constituted manifest injustice. We therefore have determined to proceed directly to the latter inquiry.

of an available remedy as a matter of strategy, which might constitute waiver of his habeas corpus remedy." *Merriweather,* 904 S.W.2d at 489. In other words, the assessment of whether manifest injustice exists requires the court to consider whether movant had a valid reason for not raising the issue at a prior procedural juncture, such as on direct appeal or in a post-conviction motion.

In making this inquiry into whether manifest injustice occurred in this case, we are guided by the analyses and contrasting results in two prior cases, *Simmons v. White*, 866 S.W.2d at 446 and *Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App. W.D. 1997). In *Simmons*, the petitioner claimed error in sentencing him as if he had three prior convictions when, in fact, only two were proved at the time of judgment and sentence. Mr. Simmons failed to raise this issue on direct appeal or by post-conviction motion under Rule 24.035, however. Our Supreme Court concluded that, while this "procedural default does not absolutely preclude him from seeking habeas corpus for this purpose, the scope of review to which he is entitled is extremely limited." *Simmons,* 866 S.W.2d at 446. The Court found that this type of error was not jurisdictional in nature, and thus it could review only for manifest injustice.

Simmons found that manifest injustice would not result if it failed to grant a writ of habeas corpus because "[w]e are convinced that petitioner's procedural defaults stemmed not from unawareness but from a calculated, strategic decision to forego both appeal and post-conviction motions in the hope of receiving probation within 120 days." 866 S.W.2d at 446-47. In other words, since the failure to raise this issue earlier was a strategy decision, it was not unjust to bar consideration of it on habeas corpus.

By contrast, in *Brown*, the petitioner was entitled to habeas corpus relief where the record revealed that he did not forego raising a sentencing issue on direct appeal or in his post-

conviction motion in order to obtain a strategic advantage, but rather failed to raise it earlier because it was not then known to him. As we stated:

> Mr. Brown's complaint was not known to him nor was it reasonably discoverable to him during the applicable ninety-day time limitation under Rule 24.035. It was impossible for Mr. Brown to realize that he would be denied probation until 120 days after he began his sentence, or thirty days after the time limits of Rule 24.035 had run. Therefore, because Mr. Brown is "restrained of liberty within this state" under Rule 91.01 and is inquiring into the cause of his restraint, a petition for a writ of habeas corpus is the appropriate remedy.

Brown, 947 S.W.2d at 440. Thus, because Mr. Brown was not aware of the impropriety in his restraint until after his other procedural opportunities to raise the issue had passed, he was not barred from raising the issue on habeas corpus. As the error resulted in his being unjustly restrained of his liberty, he was therefore entitled to habeas corpus relief. *Id.*

This case is analogous to *Brown* rather than to *Simmons*. Nothing in the record suggests that Mr. Clay was aware of his right to relief until after his appeal and post-conviction motions had been filed and denied. There is no evidence that he received a copy of or was otherwise aware of the order granting the expungement motion, and certainly was not so informed by the prosecutor, who affirmatively used the prior conviction to deny Mr. Clay jury sentencing. Indeed, so far as the record shows, Mr. Clay was unaware of the expungement, and thus unaware of the grounds he now asserts provide him with a right to habeas corpus relief, until he received a copy of the expungement order after the Platte County prosecutor requested permission to expunge his records of Mr. Clay's prior conviction without providing him with a copy of those records.

And, unlike in *Simmons*, where defendant hoped to receive probation in 120 days, here Mr. Clay had no reasonable incentive for not mentioning the expungement; this course of action could only hurt him by denying himself a jury-determined sentence. Additionally, subsequent to learning in 1992 that the expungement order had been granted, Mr. Clay diligently took steps to obtain relief. Indeed, it was his letter to the Platte County Clerk's office that initiated the discovery of this order. Furthermore, once he learned of the order, he filed petitions for writs of habeas corpus at both the state and federal levels.[2] For these reasons, this Court finds that Mr. Clay is entitled to raise the issue of his wrongful confinement by means of habeas corpus and that his failure to raise it on direct appeal or in his post-conviction motion did not constitute a waiver of his right to habeas corpus relief.

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[2] The State asks us to engage in speculation that Mr. Clay might have known of the expungement order at the time it was used to deny him jury sentencing and made a strategy decision not to raise that issue, or that he failed to exercise "due diligence" in not inquiring earlier whether his motion to expunge his prior conviction had been granted, and that this is what caused him to be denied jury sentencing. The State cites no authority for this "due diligence" test. Even were it applicable, however, there is nothing in the record to support the claim that Mr. Clay should have known that the expungement order had been entered, and in fact the only record evidence is that the Platte County records still showed his conviction at the time of his later trial. Were this not so, then the Clerk would not have so certified and the prosecutor surely would not have knowingly used an expunged conviction to take from Mr. Clay his right to jury sentencing. Yet, if the prosecutor and the Clerk did not receive notice of entry of the expungement order, there could be no basis to infer that Mr. Clay might have done so. And, common sense indicates that Mr. Clay could not have had any reason to hide the expungement had it been granted. He could not benefit by being thought to be a prior offender, and had he wanted to avoid jury sentencing he could have done so without making the judge think he was a prior offender. We thus reject the State's argument.

We also find that this denial of Mr. Clay's right to jury sentencing rises to the level of manifest injustice. This follows from the fact that, while a criminal defendant does not have a constitutional right to have a jury determine punishment, *State v. McClanahan*, 954 S.W.2d 476, 481 (Mo. App. W.D. en banc 1997), the right to jury recommendation of sentence is granted by statute, and the sentence recommended by the jury will constitute the maximum punishment which the court can impose. Sec. 557.036.2(2) RSMo 1994. Such a right to jury sentencing has been found to be such a valuable right that our courts have long held that where, as here, a court has improperly classified a defendant as a prior offender for purposes of sentencing, "and the evidence is insufficient to support that finding, defendant is entitled to a new trial on all issues." *State v. McFall*, 866 S.W.2d 915, 919 (Mo. App. S.D. 1993). *Accord*, *State v. Harris*, 547 S.W.2d 473, 475-476 (Mo. banc 1977); *State v. Blackwell*, 459 S.W.2d 268, 271 (Mo. banc 1970); *State v. Vermillion*, 446 S.W.2d 788, 790 (Mo. banc 1969); *State v. Hill*, 371 S.W.2d 278, 282-283 (Mo. banc 1963); *State v. Olson*, 806 S.W.2d 111, 112-113 (Mo. App. W.D. 1991).[3] The evidence was indisputably insufficient to support that finding here once the expunged conviction is excluded.[4]

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[3] For similar reasons, if the jury is allowed to assess punishment, but is improperly instructed as to the range of punishment, then a new trial on all issues will be required even though the sentence the jury recommended was, in fact, within the range which would have been allowed had the jury been properly instructed. *See, e.g., State v. Whardo*, 859 S.W.2d 138, 140-41 (Mo. banc 1993); *State v. Cline*, 808 S.W.2d 822, 826 (Mo. banc 1991).

[4] If the record had been ambiguous as to whether the petitioner should have been sentenced as a prior offender, we could have remanded for a hearing on that issue. If the result of the hearing were unfavorable to him, the court could sentence him on remand; otherwise the court would have been required to grant a new jury trial on all issues. *See State v. Lowery*, 926 S.W.2d 712, 713 (Mo. App. E.D. 1996); *State v. Martin*, 882 S.W.2d 768, 772 (Mo. App.

Accordingly, we find that the State's use of the expunged 1974 conviction to accord Mr. Clay prior offender status and so deny him his right to jury recommendation of sentence constitutes manifest injustice which entitles him to habeas corpus relief.

IV. MANDAMUS RELIEF

Mr. Clay also requests us to issue our writ of mandamus directing the State to expunge all references to his prior conviction from his record, as required by Judge Yeaman's July 2, 1980 order. The State argues that this would be a cumbersome task to perform and might overtax its resources, and therefore we should not grant this relief.

In order for mandamus to be an appropriate remedy, the party seeking to invoke the writ must do so with an intent to "enforce, not establish, a claim or right and [his or her] purpose [must be to] execute not adjudicate." *Carmack v. Saunders*, 884 S.W.2d 394, 398 (Mo. App. W.D. 1994); *St. Louis Police Officers Ass'n v. Sayad*, 685 S.W.2d 913, 916 (Mo. App. E.D. 1984). Our Supreme Court has held that:

> Mandamus is a discretionary writ, not a writ of right. Mandamus will lie only when there is a clear, unequivocal, and specific right. The right sought to be enforced must be clearly established and presently existing. A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. As this Court has often stated, the purpose of the writ is to execute, not adjudicate.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 576 (Mo. banc 1994) (citations omitted).

E.D. 1994); *State v. Wickizer*, 641 S.W.2d 849, 853 (Mo. App. W.D. 1982).

Mr. Clay is not seeking to establish a legal right, but to compel performance of his statutory right under Section 195.290 to have Respondent's records of his 1974 conviction expunged. Section 195.290, as written in 1978, specifically provided that a person "may apply to the court which sentenced him for an order to expunge from all official records, except . . . [certain drug records], and all recordations of his arrest, trial and conviction." Sec. 195.290 RSMo 1978 (Repealed L. 1989). In accordance with this statute, Judge Yeaman's order provided "that all official records, recording his arrest, trial and conviction be expunged and that the said movant, be restored, in the contemplation of the law, to the status he occupied prior to the within arrest and conviction . . ." Thus, pursuant to Section 195.290 and Judge Yeaman's order, Mr. Clay's specific right to have his 1974 conviction expunged is clearly established and presently exists. Therefore, mandamus is available here.

Neither the statute nor Judge Yeaman's order provided an exception to expungement where the State has erroneously failed to comply with the terms of the expungement order for such a long period of time that the number of improper references to the prior conviction has multiplied. We do not agree that it will be unduly burdensome for the State to comply with the statute or with Judge Yeaman's order. While the State argues that, if we grant mandamus relief here, it will have to take similar corrective action in other cases, creating a significant burden, we find it unlikely that the State has incarcerated in its prisons many other persons who have had prior expungement orders ignored, as occurred here. If there is a multitude of such persons, however, then they would be entitled to the same relief.

Accordingly, for the reasons stated above, we grant Mr. Clay habeas corpus relief and direct Respondent to remand Mr. Clay to Platte County for a new trial and jury sentencing. We also make our Preliminary Writ of Mandamus Absolute

and direct Respondent to expunge from its records all references to Mr. Clay's 1974 conviction and to him as a prior offender, and we order that, in accord with Section 195.290 and Judge Yeaman's order, he be given the status and rights as to confinement and consideration for parole of one who, like Mr. Clay, is not, in the contemplation of the law, a prior offender.

/s/
LAURA DENVIR STITH, PRESIDING JUDGE

JUDGE EDWIN H. SMITH AND JUDGE ALBERT A. RIEDERER CONCUR

APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
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THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

January 9, 2001

Ms. Susan Hogan
Suite 200
818 Grand Boulevard
Kansas City, MO 64106

In Re: Arthur Scott Clay vs. Dave Dormire, Superintendent, and the Office of the Platte County Prosecuting Attorney
Missouri Supreme Court No. SC82331

Dear Ms. Hogan:

Please be advised that the following order was entered on this date in the above-entitled cause:

"Relator's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Mr. Michael J. Spillane/Office of Missouri Attorney General

Minutes of January 9, 2001

Supreme Court of Missouri
en banc

January 9, 2001

PER CURIAM

SC82868 Richard Otto Lueckenotte, Appellant-Respondent, vs. Mary Jane Lueckenotte, Respondent-Appellant.

AFFIRMED IN PART; REVERSED IN PART; REMANDED. All concur.

MOTIONS FOR REHEARING

SC82685 American Standard Insurance Company, Appellant, vs. Jeanette Hargrave, et al., Respondents.

Appellant's motion for rehearing overruled. Covington, J., not participating.

SC81479 State of Missouri, Respondent, vs. Alis B. Johns, Appellant.

Appellant's motion for rehearing overruled. Execution set for April 13, 2001.

SC82331 Arthur Scott Clay, Relator, vs. Dave Dormire, Superintendent, and the Office of the Platte County Prosecuting Attorney, Respondents.

Relator's motion for rehearing overruled.

Day-to-Day

/s/

William Ray Price, Jr.
Chief Justice

The next regular conference of Court en Banc will be on January 23, 2001.